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MAILED

AUG 17 2010

OFFICE OF PETITIONS

In re Patent No. 7,674,280
Nesper, et al. : DECISION FOR REQUEST
Issue Date: March 9, 2010 : FOR RECONSIDERATION
Application No. 10/731,284 : OF PATENT TERM
Filed: December 9, 2003 : ADJUSTMENT
Attorney Docket No. **HOE-790** :

This is a decision on the "LETTER REGARDING PATENT TERM ADJUSTMENT," filed April 15, 2010, which will be treated under 37 CFR 1.705(d). Patentees request that the patent term adjustment indicated on the face of the Letters of Patent be corrected from one thousand, two hundred and twelve (1,212) days to one thousand, sixty (1,060) days.

The request for reconsideration of the patent term adjustment under 37 CFR 1.705(d) is **DISMISSED**.

On March 9, 2010, the above-identified application matured into U.S. Patent No. 7,674,280, with a revised patent term of 1,212 days. The instant petition was timely filed within two months of the date of issuance of the patent. Patentees assert that the Office failed to account of the filing of a Notice of Appeal on January 7, 2008, and a Request for Continued Examination on April 7, 2008.

A review of the file history reveals that the revised patent term adjustment differs from patentees' calculation due to three factors. The first factor is the calculation of the "B" delay for which patentees' calculate the adjustment period as 394 days. The maximum "B" delay is, in fact, 393 days. The "B" delay period began December 10, 2006, and ended April 6, 2008, on the day before the date the Request for Continued Examination was filed. The maximum "B" delay period is 484 days. The period of appeal must be excluded from the "B" delay. The relevant appeal period began January 7, 2008, with the filing of the Notice of Appeal, and ended on April 6, 2008, the day before the date the Request for Continued Examination was filed. The excluded appeal period is 91 days. Thus, the "B" delay is 393 days (484 -91).

The second factor concerns the patentees assertion that there are 17 days of overlap between the "A" and "B" delay that must be subtracted from the patent term adjustment. The relevant period of overlap for the "B" delay began March 11, 2007, and ended April 6, 2008. It is noted that the "A" and "B" periods of delay can only overlap if the delays occur on the same calendar day. There is no period of delay between the "A" and "B" delay that occurs on the same calendar day.

Thus, the period of overlap to be subtracted from the patent term adjustment is 0 days, not 17 days as patentee asserts.

The third factor, for which patentees do not account, concerns the adjustment to the patent term of 136 days entered after a notice of allowance was mailed on November 2, 2009, four months and 136 days after an amendment after final rejection was filed. A Notice of Panel Decision from Pre-Appeal Brief Review was mailed on July 15, 2009, re-opening prosecution and withdrawing the rejection. It was, therefore, appropriate to enter a period of adjustment of 136 days.

In view thereof, the revised patent term adjustment is 1,212 days (1,215 days of Office delay – 3 days of applicant delay). No changes to the patent term adjustment will be entered.

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

Deposit account 50-0625 will be charged \$200.00 for the fee set forth in 37 CFR 1.18(e). No additional fees are required.

Further correspondence with respect to this decision should be addressed as follows:

By Mail: Mail Stop Petition
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

By FAX: (571) 273-8300
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By Hand: Customer Service Window
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Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3222.

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